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IN THE

Supreme Court of the United States

October Term, 1963

No. 241

DALE ROSS,
Petitioner,

v.

GREAT NORTHERN RAILWAY COMPANY, a Corporation,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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STATEMENT OF THE CASE

Plaintiff was injured when he fell from a trailer load of aluminum on flat car while attempting to cover the trailer with a tarpaulin.

For its statement of the case, respondent, Great Northern Railway Company, adopts the statement of facts in the opinion issued by the Ninth Circuit Court of Appeals on March 13, 1963 (Petitioner's Brief, Appendix B, pp. 34 through 46).

QUESTION PRESENTED

The question presented here is the simple factual and legal question, as follows:

> Where under applicable State law a U. S. District Court finds that the evidence favorable to the plaintiff does not rise to the quality and substance of evidence required to prove that negligence of the defendant

proximately caused the injury and that the evidence for plaintiff is based on conjecture and speculation, does such Court have the authority to set aside a verdict for plaintiff?

The Circuit Court and the District Court Searched the Record and Could Find No Proof of Negligence or Proximate Cause on Which to Base a Verdict. Petitioner Attempts to Do So by Distorting the Record.

The evidence most favorable to petitioner and, in fact, the only direct evidence describing the fall and purporting to establish the proximate cause, is the following entire testimony of plaintiff on that subject:

"Q. What happened to you after you had given the way bill to Mr. McFarland and gotten up and started to unravel the tarp?

"A. I got back up on the load, and at that time my brother, Jerry, was there, he said, 'We are going to have to turn the tarp. We are going to have to turn it.'

"Q. Did you turn it?

"A. We were in the process. I stepped across the load to the south side at that time.

"Q. And then what happened at that time?

"A. I reached down, we were pulling and stretching or moving the tarp out, and I was over the side." (R. 108)

"Q. Going back to my question, would you describe from your recollection how that tarp felt up to the time you fell off this load?

"A. Well, we were having a little trouble moving it not too much, and as I was unfolding it and turning it, it seemed to give way and I went over the side." (R. 109)

"THE COURT: Let me put it this way, just tell us

again, Mr. Ross, what you did at the time and what happened to you.

"A. Well, as I was moving the tarp and unfolding it, I ran into trouble, or it was holding up, and I braced myself to keep the tarp moving and unfolding, and something gave way. And I stepped back, I slipped, my hand slipped, I was over the side. I catapulated to the ground. I did not touch the side of the car." (R. 113) (Trial Court's Memorandum Decision R. 39-40.)

From the above testimony of plaintiff and the testimony most favorable to plaintiff, he distorts the record and comes up with assertions such as the following:

"... the tarpaulin containing foreign sharp wires extending through eyelets of the tarpaulin, which hung up the tarpaulin and caused it to resist unfolding by petitioner, the wires suddenly releasing the fold of the tarpaulin so as to cause the petitioner to be catapulted off of the top of the load, ..." (Petitioner's Brief, p. 3.)

The quotation above is one of many examples of an overzealous attempt of petitioner to bend the facts to fit the law. Nowhere in the record is there evidence or testimony of the folds of the tarpaulin becoming hung up. Nowhere is there evidence or testimony of "wires suddenly releasing the fold of the tarpaulin."

Again, at page 7 of Petitioner's Brief, he says:

"Also, the defendant offering no explanation of the hanging up and sudden release of the tarpaulin, ..."

Nowhere in the record did anyone testify to the "... sudden release of the tarpaulin." This is an outright distortion of the evidence by petitioner to suit his purposes and theory.

Further misstatement of the record appears again at page 11 of Petitioner's Brief, as follows:

> "As the Plaintiff was unfolding the tarp he ran into trouble. It *hung up its folds* [emphasis supplied], it refused to unfold, the plaintiff applied more force. The resistance inside the tarp, suddenly and unexpectedly released the fold and the Plaintiff was thrown off the load."

In the quotation above, petitioner has again invented facts in finding that the tarp "hung up its folds." Nowhere does the record or any testimony refer to refusal on the part of the tarpaulin to unfold. Nowhere does the record or the plaintiff show an application of more force. The record is devoid of any testimony regarding resistance inside of the tarp suddenly and unexpectedly releasing the fold or doing any other act. Petitioner next refers to his being *thrown* off the load. This statement seems to infer some outside force when, as a matter of fact, the only energy and force involved here is the human physical force applied by plaintiff himself.

As the circuit court pointed out on the 9th page of its Opinion (Petitioner's Brief, Appendix B, p. 43):

> "The difficulty with appellant's factual position on appeal is that he interprets the language: 'a slip—my hand slipped,—something gave way' into a 'sudden release of *the wires*—the only items that could cause the tarp to suddenly release.' The story told by appellant best suited to his counsel's theory of the case does not support the language used on his behalf in his briefs. It assumes the slip of appellant's hand, the bracing pull appellant made; his moving from the center of the load to the south side, facing north, and his uneven footing all *could not* have caused or proximately contributed to the occurrence

> of the accident. This without reference to appellant's deadline, his admitted haste, his alleged admitted loss of balance."

As the circuit court points out above, petitioner, in asserting that the District Court and Court of Appeals "misinterpreted the testimony," makes factual claims that are not supported by the record. The petitioner, in his brief now before this Court, has made the same factual misstatements.

At page 14 of Petitioner's Brief, he says:

> "As the testimony showed, and found by the jury, the something gave way first, which they found to be the wire, and then he slipped—his hand slipped due to the sudden release of the force within the folds of the tarpaulin."

In referring to the wires, the circuit court, in its Opinion (Petitioner's Brief, p. 43), has the following to say:

> "The jury's interrogatories did not explicitly cover or refer to wires, nor what caused the fall, nor were any such interrogatories requested or proposed."

In short, there was no such finding by the jury as alleged by petitioner, nor was there any sudden release of force within the folds because there was no force exerted between the folds of the tarpaulin.

Petitioner, at page 21 of his Brief, says:

> "... defendant never presented any hypothesis or evidence that the tarpaulin which the plaintiff was unfolding *would catch up and suddenly release with a spring-like force from any other cause*, except by the wire or wires *hanging up the inner folds of the tarpaulin*." [Emphasis supplied]

The quote above is simply another variation on petitioner's distortion and misstatement of the record. The evidence contains nothing regarding any "catching up" or "sudden release" or "spring-like force" or "wires hanging up the inner folds of the tarpaulin."

Continuing at page 21 of Petitioner's Brief, he says:

> "When the Plaintiff testified that 'something gave way . . .' (R-113) he was not referring to any part of his body, but something at that point that was invisible to him within the folds of the tarpaulin. As the force released the wires the fold straightened out and as his catapulting fall was initiated the last thing the Plaintiff saw was the wire . . . which now had come into view; but too late for the plaintiff to save himself from being violently ejected from the load."

While it is true that the portion of the record cited in the last quoted portion of the petition supports the statement that the last thing plaintiff saw was the wire, nothing in the portion of the record cited, nor elsewhere for that matter, supports or raises any inference that a "force released the wires" or that the force of the wires or any other force "violently ejected [plaintiff] from the load," or that the canvas did "suddenly release with a spring-like force."

While petitioner refers to the lower court's summing up of the evidence as ". . . a recapitulation of contradicted evidence and imagination of defense counsel and the district court. . . ." (Petitioner's Brief, p. 22), the fact remains that petitioner has not pointed to any testimony favorable to petitioner *in the record*, which was overlooked by either the district court or the circuit court. Evidence sufficient to sustain a verdict for petitioner was not and

is not in the record.

Petitioner here asserts for the first time that, "No motion for directed verdict or dismissal was made" (Petitioner's Brief, pp. 6 and 12). While respondent fails to see the significance of petitioner's claim raised here before this Court for the first time, as a matter of record this respondent, as well as other defendants, made motions to dismiss at the close of plaintiff's case. The trial court considered and denied the motions and allowed exception and reserved the motions for further consideration (R. 423, 424). Respondent requested a directed verdict by a proposed instruction submitted to the court at close of the entire case.

The District Court and the Circuit Court of Appeals Properly Gave Effect to Washington State Law Without Violation of Any of Petitioner's Rights.

When the jury by answer to special verdict on interrogatories, found that plaintiff was not an employee of any railway company (R. 36), counsel agreed that the case then became one based on Washington common law. The trial court so found in the first paragraph of his Memorandum Decision (R. 39).

The federal district court and the circuit court properly gave effect to Washington State law as required by the Rules of Decision Act (28 U.S.C. §1652), and the decisions of this Court. *Erie R. Co. v. Tompkins*, 304 U. S. 64, 82 L. ed. 1188 (1937).

The applicable Washington rules of law applied by the district and circuit courts were as follows:

1. *Substantial* evidence of defendant's negligence and the

proximate causal relationship between it and a plaintiff's injuries must be proven by plaintiff. A scintilla of evidence is insufficient under Washington law. *Wilson v. Northern Pac. R. Co.*, 44 Wn.(2d) 122, 265 P.(2d) 815 (1954); *Evans v. Yakima Valley Transp. Co.*, 39 Wn.(2d) 841, 239 P.(2d) 336 (1952); *Carley v. Allen*, 31 Wn.(2d) 730, 198 P.(2d) 827 (1948).

2. If the case presents two or more conjectural theories under one or more of which the defendant would be liable, and under one or more of which the plaintiff will not be entitled to recover, the jury will not be permitted to conjecture how the accident occurred. *Gardner v. Seymour*, 27 Wn.(2d) 802, 180 P.(2d) 564 (1947).

3. If the injury might have resulted from one of several causes, the plaintiff must produce evidence which will exclude the operation of those causes for which defendant would not be liable. 38 *Am. Jur.* 975, Negligence, §285; *DeYoung v. Campbell*, 51 Wn.(2d) 11, 315 P.(2d) 629 (1957).

4. There must be more than a mere possibility that an accident may have occurred in a particular way. *Nelson v. West Coast Dairy Co.*, 5 Wn.(2d) 284, 105 P.(2d) 76 (1940).

Following the above Washington law, the district court had no alternative but to dismiss the case, notwithstanding the verdict of the jury.

While petitioner complains vaguely of a violation of the Seventh Amendment by reason of the court granting judgment n.o.v., he does not answer or explain the plain, simple rule of law that a verdict in favor of plaintiff must

be set aside when there is not sufficient evidence to sustain the verdict. In such a case, as here, there is no element of discretion involved in ruling upon this issue. *Flannery v. Nelson*, 59 Wn.(2d) 120, 366 P.(2d) 329 (1961).

CONCLUSION

There has been no violation of any federal statute or the Constitution, nor has there been any departure from accepted judicial proceedings here. Petitioner has presented no reason under Rule 19 of Supreme Court Rules, or otherwise, for granting certiorari. The federal district court in the *instant* case had a mandatory duty to grant the motion for judgment n.o.v. and dismiss plaintiff's case on evidence which was insufficient under applicable law to support a jury verdict. For the foregoing reasons petition for writ of certiorari should be denied.

Respectfully submitted,

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